No. 2421

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARTHUR H. BRANDT, as trustee of F. S. MAYHEW, in bankruptcy,

Petitioner,

vs.

F. S. MAYHEW and MRS. F. S. MAYHEW, husband and wife,

Respondents.

In the Matter of F. S. MAYHEW,

In Bankruptcy.

RESPONDENTS' BRIEF ON PETITION FOR REVISION.

HARTLEY F. PEART,
ERNEST K. LITTLE,
Solicitors for Respondents.

Filed this.....day of May, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

BERNAU PUBLISHING COMPANY

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RESPONDENTS' BRIEF ON PETITION FOR REVISION.

The statement of facts contained in petitioner's opening brief is in substance correct, but we desire to expand such statement in two particulars. The conveyance of the real property made by the respondents to Willard O. Wayman was, according to the testimony, an attempt upon the part of the bankrupt to rehabilitate himself, Wayman being regarded as a trustee not only for all of his creditors, but also for himself. At this time his lia-

bilities exceeded his assets. The referee in his certificate says:

> "The testimony is of a somewhat indefinite character as to the facts concerning this assignment. My inference from the testimony was that it was intended to be for the benefit of all creditors."

The certificate of the referee and the record as presented, further do not show what appeared by uncontradicted testimony at the hearing, namely: that the bankrupt from a time shortly after his adjudication up to within a few days prior to the filing of his schedules was suffering from a nervous breakdown, being under treatment for a portion of said time in a sanatorium. Therefore, his schedules were filed as promptly as possible by him, including his claim to the homestead exemption, as soon as he was in a condition to take such step, and meanwhile his wife acted in their joint behalf. We believe that such facts will be conceded as a part of the record by the trustee, should they be deemed in any way material by this court.

Argument.

Upon the facts as stated by the trustee with the foregoing addenda, two questions of law are presented to this court, namely: 1. Is a bankrupt in the State of California entitled to claim a real estate homestead exemption where neither he nor anyone in his behalf has made and recorded a

declaration of homestead as required by the state statutes prior to his adjudication in bankruptcy? 2. Assuming that he would be so entitled, is he precluded from making such a claim by a voluntary conveyance of the real property for the benefit of himself and his creditors or for the benefit of all his creditors, which conveyance the trustee thereunder did not accept and which was made prior to adjudication? It will be noted that question 2 is stated in somewhat different terms from what it is stated by the trustee.

Answering the first question presented by the trustee, we shall endeavor to show that (I) a bankrupt under the laws of the State of California is entitled to claim a real estate homestead exemption where neither he nor any one in his behalf has made and recorded a declaration of homestead as required by the state statutes prior to his adjudication in bankruptcy, A. under the provisions of the bankruptcy act itself without regard to the insolvency law of the State of California; and B. that the bankrupt is entitled thereto under the exemptions allowed by the insolvency act of the State of California; nor C. does the amendment to section 47a of the bankruptcy act made in 1910 have any effect upon either of these propositions. (II) The second question, we believe, should be answered in favor of the bankrupt, whether stated in the terms proposed by the trustee or as hereinabove set forth. Taking these questions up in their order.

I. A BANKRUPT IN THE STATE OF CALIFORNIA IS ENTITLED TO CLAIM A REAL ESTATE HOMESTEAD EXEMPTION WHERE NO DECLARATION OF HOMESTEAD HAS BEEN MADE AND RECORDED AS REQUIRED BY THE LAWS OF THE STATE OF CALIFORNIA PRIOR TO HIS ADJUDICATION UNDER THE PROVISIONS OF THE BANKRUPTCY ACT, (A) IRRESPECTIVE OF THE PROVISIONS OF THE INSOLVENCY ACT OF THE STATE OF CALIFORNIA.

This principle was laid down in the case of

In re Culwell, 165 Fed. 828 (D. of Montana).

In this case, just as here, an exemption was claimed in the schedule, but no declaration of homestead had been filed until after adjudication, yet the exemption was allowed, the court saying,

> "My opinion is that the court should allow the bankrupt's claim of exemption and that the trustee should release any control he may be assuming. The basis for this view rests upon construction of the provisions of section 70a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 565, which vests in the trustee in bankruptcy the title of the bankrupt as of the date he was adjudged a bankrupt 'except in so far as it is to property which is exempt', etc., and also of section 6a which in so far as pertinent here, provides that the bankrupt act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the state in force when the petition in bankruptcy is filed. I do not construe the bankrupt act as meaning that upon the trustee's qualifying the bankrupt is deprived of all right to perfect his homestead exemption provided in his schedules he claims a designated piece of realty as a homestead and exempt, and provided he proceeds, under the state statutes, without delay, and provided always there is no fraud involved in the matter of the claim. The bankrupt act,

in its further provision concerning 'the allowance' to bankrupts of exemptions, as provided for under the state law, necessarily contemplates determination by the bankruptcy court of 'claims' for exemptions by the bankrupt in his schedules, and after determination, setting apart or refusal to set apart. Section 7, Cl. 8, Bankrupt Act; In re Le Vay (D. C.), 125 Fed. 990.

"Yet the act does not make it a precedent to having a homestead allowed to the bankrupt, claiming the same in the bankruptcy court, that the homestead shall have been designated pursuant to the state statute, prior to the date of adjudication in bankruptcy. In re Friedrich, 100 Fed. 284, 40 C. C. A. 378. If the bankrupt has expeditiously and in good faith made his declaration, following the claim in the schedule, the property is exempt and cannot be retained for administration. In re Fisher (D. C.), 142 Fed. 205; In re Brumbaugh (D. C.), 128 Fed. 977. It has been well said 'Courts of bankruptcy are not controlled as to the time or manner in which claims for exemptions may be preferred in bankruptcy.' In re Kane, 127 Fed. 552, 62 C. C. A. 616."

To the same effect are:

In re Friedrich, 100 Fed. 284;

In re Fisher, 142 Fed. 205;

In re Brumbaugh, 128 Fed. 977;

Goodman v. Curtis, 174 Fed. 644;

Pulsine v. Hussy, 9 A. B. R. 657;

In re Falconer, 110 Fed. 111;

Steele v. Buel, 104 Fed. 968;

In re Burnham, 202 Fed. 762.

We direct the particular attention of the court to the last cited case where this language is used:

> "If the homestead exemption is claimed seasonably in the bankruptcy proceeding, it has been held, it may thereafter be perfected under the state law, if the claimant proceeds expeditiously."

Citing: In re Culwell, supra; Goodman v. Curtis, supra; In re Fisher, supra.

The opinion in the case of

In re Burnham, supra,

also considers the case of

In re Youngstrom, 153 Fed. 58,

which is cited at some length by the trustee and relied upon by him as a leading authority against the bankrupt in this connection. The District Court of Washington, however, in the Burnham case reviewing all of these decisions, fails to so construe the Youngstrom case.

Remington on Bankruptcy, Vol. 3, Supplement, p. 257,

cites the Culwell case as authority for this statement in the text:

> "However, the mere perfecting of homestead exemption rights by filing a statutory 'designation of homestead' may be done after the bankruptcy."

The case at bar falls squarely within the principles of law announced in the foregoing cases; for in this case after the adjudication but within seasonable time the bankrupt's wife duly made and

recorded a declaration of homestead for the joint benefit of herself and her husband "under and pursuant to the laws of the State of California", as the trustee states in his petition for revision, and the bankrupt himself at the time of filing his schedules duly claimed the exemption. We therefore submit, without any consideration of the provisions of the insolvency act of the State of California, that the bankrupt is entitled to his homestead exemption duly claimed and perfected in accordance with the bankruptcy act and the state statutes, under the authorities above mentioned; and we further submit that the weight of authority is in favor of the bankrupt's contentions upon this proposition. This brings us to the second subdivision of the first proposition.

I B.

A BANKRUPT IN CALIFORNIA IS ENTITLED TO CLAIM A REAL ESTATE HOMESTEAD EXEMPTION WHERE NO DECLARATION OF HOMESTEAD HAS BEEN FILED BY HIM OR ON HIS BEHALF PRIOR TO HIS ADJUDICATION, UNDER THE TERMS OF THE INSOLVENCY ACT OF THE STATE OF CALIFORNIA. (Statutes of California of 1895, page 153.)

The section of the insolvency act in question is paragraph 4 of article 10, and reads as follows:

> "It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent, such real and personal property as is, by law, exempt from execution; and also a homestead in the manner provided by section 1465, of the Code of Civil Procedure."

It is manifest that the laws of the State of California on the question of homestead are comprehensive and include all cases. The various sections of the code governing this valuable right are mentioned and referred to by the trustee. Section 1465 of the Code of Civil Procedure was designed to protect the family of a decedent in cases where no declaration of homestead had been filed by the decedent in his lifetime. By the provisions of the insolvency act this right was extended to an insolvent. The case of

In re Schwartz, No. 5906 U. S. Dist. Court, for the Northern District of California,

is a leading case in this district. The referee in bankruptcy held that it was his duty under the provisions of the insolvency act to allow a homestead claimed by the bankrupt in his schedules, although no declaration had been filed prior to the adjudication, upon the ground that this provision of the insolvency act was in force. This order of the referee was affirmed by the District Court and the same ruling was made in

In re McCoy, No. 5536 U. S. Dist. Court, for the Northern District of California.

In this case the bankrupt had attempted to file a declaration of homestead prior to his adjudication. Through error this declaration was filed upon property which he had conveyed to a third party and the referee considered the case upon the basis that no declaration in accordance with the state

statute had been recorded prior to the adjudication. The referee in his order uses this language:

> "It must be conceded that unless the trustee has a vested right in the premises now sought to be exempted, no adverse interests have intervened and no creditor will be injured by this court granting to the bankrupt that to which he of right would have been entitled in these proceedings had not the error been made. Under the 70th section of the act the trustee is vested, by operation of law, with the title of the bankrupt as of the date he was adjudicated a bankrupt of certain premises therein described, except in so far as relates to property which is exempt. It is now held, as was held in the Schwartz case, that the 60th section of the insolvent law of this state is not in conflict with the provisions of the bankruptcy act, and that it is one of the laws of this state, which was in force, and not suspended, at the date of the filing of the petition in bankruptcy."

This ruling of the referee was affirmed by the United States District Court for the Northern District of California.

In attempting to override the authority of these cases,

> In re Schwartz, supra;
>
> In re McCoy, supra,

the trustee argues that the term "exemptions" as used in section 6 of the bankruptcy act is restricted to exemptions "from judicial process on execution" and cannot be deemed to apply to exemptions "peculiar to state insolvency laws," and also that the state insolvency law was not a statute "in force"

within the meaning of section 6 of the bankruptcy act at the time of the taking of proceedings in the case at bar. It would seem that little profit is to be derived from any attempt to limit the meaning of the word "exemptions" as used in section 6, as the act specifically states that they are such as are prescribed by the state laws in force at the time of filing the petition. The homestead is certainly the essence of the term "exemption", and how or in what manner the exemptions provided for in a state insolvency statute are to be distinguished from those exemptions afforded by any other state statute is not apparent. The Civil Code of California provides as follows:

Section 1240:

> "The homestead is exempt from execution or forced sale save as in this section provided."

The same code defines the homestead as follows:

Section 1237:

> "The homestead consists of a dwelling house in which the claimant resides and the land upon which the same is situated, selected as in this section provided."

Therefore, there would seem to be no argument upon the question that a homestead is an exemption allowed by the state statutes and the bankruptcy court would in any case look to the state statute for an enumeration of the exemptions to which the bankrupt is entitled.

Counsel for the trustee next devotes several pages of his brief to an argument that the state insolvency

act was not a law in force at the time this exemption was allowed by the referee and concludes his argument with the statement that the state insolvency act was completely suspended by the bankruptcy act of 1898. This conclusion is entirely at variance with the case of

In re Amoratis, 178 Fed. R. 919.

This case was decided by this court, May 2, 1910, and was a petition for revision of an order of the District Court of the Northern District of California affirming the order made by the referee disallowing the right of priority of payment to a creditor for certain costs incurred in an attachment suit brought by such creditor against the bankrupt, all of which costs were expended prior to the filing of the petition in bankruptcy. The creditor urged that these costs were a first lien by virtue of a priority given under subdivision 5 of section 64b of the bankruptcy act, which provides that among the debts entitled to priority are "(5) Debts owing to any person who by the laws of the states or the United States is entitled to priority". This contention depended upon whether under the insolvency law of the State of California, the petitioner would be entitled to such priority. The court then quoted a portion of the insolvency act which is in question here (Statutes of 1895, page 153), which section provides that such costs under such state law shall be a preferred debt, and the opinion by Judge Ross then proceeds:

> "The record in the present proceeding shows that the claim upon which the petitioner brought its attachment suit in the state court was provable and was proved against the estate of the bankrupt. It could not have been so proved, had it not been shown that the costs were incurred by the petitioner in good faith. In like circumstances they would have been provable and entitled to priority in insolvency proceedings under the California statute cited. The fact that under that statute a claim for such costs is entitled to priority, even though the proceedings by the attaching creditor were prompted by the desire to secure a preference, does not, in our opinion, deprive the attaching creditor, whose good faith brings him within the provisions of the bankruptcy act, as well as of the state insolvency act, of priority for such costs necessarily expended. As said by the court In re Iroquois Mach. Co., (D. C.) 166 Fed. 629, 631:
>
> " 'It seems to be the policy of the bankruptcy act to recognize both exceptions and priorities created by the state law, though this leads to some diversity in the administration of the bankruptcy act in various jurisdictions. Holden v. Stratton, 198 U. S. 202 (25 Sup. Ct. 656, 49 L. Ed. 1018).' "

This court has therefore held that the provisions of the state insolvency law relating to priorities of certain claims are still in force and there is certainly no authority or principle for holding that its provisions regarding exemptions should be deemed a nullity.

The trustee goes further with his argument, however, and seeks to show that the administrative features and scheme of title provided for by the in-

solvency act are inconsistent with the theory and provisions of the bankruptcy act, and that therefore the homestead exemptions given by the insolvency act cannot be enforced, quoting section 1465 of the Code of Civil Procedure which is incorporated in the insolvent act. The trustee points out the entire difference in procedure and that under this section the court is empowered to set aside a homestead and not the bankrupt. And further that the bankruptcy act contemplates and provides for the passing of title from the bankrupt to the trustee as of the date of adjudication, and that this provision would be at total variance with the passing of title by the setting apart of a homestead in the bankruptcy proceeding under the provisions of section 1465 of the Code of Civil Procedure. This argument we think is wholly fallacious.

Let us assume that the bankrupt in this case had never selected or perfected a homestead by filing a declaration therefor prior to his adjudication. Let us further assume that the bankrupt's decease occurred before he had filed his schedules or made any claim in the bankruptcy proceedings to a homestead exemption. Section 8 of the bankruptcy act provides:

> "The death or insolvency of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner so far as possible, as though he had not died or become insane; provided that in the case of death the widow and children shall be entitled to all rights of dower and allowance fixed by

> the laws of the state of the bankrupt's residence."

Under this provision of the act and under the provisions of section 1465 of the Code of Civil Procedure of the State of California, we believe that the widow and children would be entitled to claim a homestead in such event and that the bankruptcy court would be compelled to set the same aside to them, and that the same would be set aside to them under the procedure of the bankruptcy act. The case of

> In re Dicks, Dist. Court N. E. D. Ga. S. D., 198 Fed. R. 293,

is instructive on this point. It would seem upon a reading of the opinion that the same argument in reference to the vesting of title was made in that case as is made here. The court quotes Collier (8th Ed.), p. 195, as follows:

> " 'The proviso protects all the rights, dower and otherwise granted to the widow and children under state statutes. The clause is a new enactment, but it does not change existing law. The doctrine rests on the principle that the trustee's title is charged with the same liens and burdens, whether actual or inchoate, as was the bankrupt. It is not material that the husband died after the vesting of the title in the trustee.' "

In the course of the opinion the court further says:

> "Here it is true the deceased did not die actually seized and possessed of the values set apart for the year's support. A statutory, but

> not an unqualified title to this had vested in the trustee. But can it be denied that the bankrupt living, or his family when dead, had an 'estate' in the assets? While he lived he had the right to an exemption, he had the right to propose a composition with his creditors, which the court might have ratified and directed the trustee to reconvey the assets to him."

And further:

> "To briefly re-state our view of this question, the title of the debtor cast upon the trustee by the bankruptcy law is for distribution to pay the debts. It is not an absolute title. The rank and priority of the debts are almost without exception determined by the law of the state. By the law of Georgia the year's support is to be 'preferred before all other debts', with certain exceptions not material here, and the year's support must be set apart either in property or money from the estate of the deceased. The year's support is then an inchoate lien, with few exceptions, superior to the claims of creditors."

These excerpts will serve to illumine the "twilight zone" to which the trustee adverts.

Upon this whole subject and particularly referring to the case of

In re Anderson, 110 Fed. 141,

cited by the trustee, we believe that counsel has confused substantive rights with questions of procedure. As we understand the law, the substantive rights of a bankrupt and his family to their exemptions are determined by the state statutes, but

all questions of procedure are determined by the national act. In the Anderson case the exemptions mentioned, if they can be termed such, were made a peculiar feature of the administrative procedure of the state law, and the two procedures in that case were beyond question in conflict. This was unquestionably the basis of that decision. As was said

In re Burnham, 202 Fed. 762.

> "The bankruptcy act making no provision, there is no question but that the state law will control as to the extent of and requisites of a homestead exemption; but the time within which such exemptions are to be claimed and the manner of claiming same are fixed by the bankruptcy act itself and its provisions in that respect are controlling."

It is submitted, therefore, that the insolvency law of the State of California was a law in force at the time this exemption was granted, and that the said law grants to the bankrupt as exempt a homestead under the provisions of the Civil Code and Code of Civil Procedure. Passing now to the third subdivision of this question, namely:

I C.

WHAT IS THE EFFECT OF THE AMENDMENT TO SECTION 47A OF THE BANKRUPTCY ACT?

The argument of the trustee upon this question is entirely based upon an assumed construction of the amendment as being directed against exemp-

tions. The clause of the original section in question reads:

> "Trustees shall respectively * * * (2) collect and reduce to money the property of the estates for which they are trustees under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest."

Under the amendment this clause now reads:

> "Trustees shall respectively * * * (2) collect and reduce to money the property of the estates for which they are trustees under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

The purpose of this amendment was not to bar any exemption given to the bankrupt. The purpose of the amendment is discussed in the case of

> In re Williamsburg Knitting Mill, 190 Fed. 871.

This case arose in Virginia, and was decided in June, 1911. The court in this decision says:

> "The amendment of 1910 was passed as a result of a decision in the York Manufacturing

> Co. case, 201 U. S. 344, and to give the trustee precedence over an unrecorded vendor's lien."

In the York Manufacturing Co. case it was held that the trustee had no better rights than the bankrupt. Remington on Bankruptcy, Vol. 3, at page 331, states that by this amendment the doctrine operates as a remedy, and that the amendment was an attempt to modify the decision in the York Manufacturing Co. case. Remington quotes the report of the Judiciary Committee, which report states that the purpose of the amendment was to meet the case in question.

Collier in the 8th edition of his work, at pages 541 and 542 declares that the purpose of the amendment is the same as above stated and suggests that the amendment should have been to section 70 instead of 47. In the Williamsburg Knitting Mill case the court further says:

> "The policy of the act is to clothe the trustee with title as against claims, liens, and equities, and compel everyone to comply with the state statutes respecting recordation and in consequence of failure to do so to lose their claim upon all right to the lien or equity."

The amendment is also construed in

In re Dancy Co., 198 Fed. 336,

in which it is stated that its purpose is to avoid secret, unrecorded liens of creditors. The purpose of the amendment is further exemplified in

In re Farmers' Supply Co., 196 Fed. 990,

where it is stated to be.

"It was intended to protect general creditors against the holders of unrecorded mortgages and conditional sale contracts and under such provision the right of a trustee to the property held by the bankrupt under a contract of conditional sale not recorded, or to the proceeds of such property coming into his hands, is superior to that of the seller."

It is similarly construed in the following cases:

In re Gehris Herbine Co., 187 Fed. 502;
In re Nelson, 191 Fed. 233;
In re Kreuger, 199 Fed. 367.

We have carefully examined the following cases which have arisen since the amendment and indirectly concern questions of exemption, but are of the opinion that they throw very little light on the question presented here.

In re Codori, 30 A. B. R. 453;
In re Farmers' Co-operative Co., 30 A. B. R. 190;
In re Morris, 30 A. B. R. 319;
Pacific States Bank v. Coats, 30 A. B. R. 655;
In re Whatley Bros., 29 A. B. R. 64;
In re Stein, 30 A. B. R. 694;
In re Phillips, 30 A. B. R. 597.

They do, however, serve to bring out one principle which is clearly stated by the United States District Court of the District of North Dakota, in the case of

In re Farmers' Co-operative Co., supra,

in the course of its decision this court has the following to say regarding the amendment.

> "The history of the statute as given by Remington, Vol. 3, p. 331, and explained In re Farmers' Co-operative Co., (D. C. Ga.) 28 A. B. R. 535, 196 Fed. 991, and In re Williamsburg Knitting Mill, (D. C. Va.) 27 A. B. R. 178, 190 Fed. 871, shows that it was merely remedial, intended to correct a misinterpretation of the Bankruptcy Act by the courts. This view was also manifest in the face of the statute. It declares that trustees in bankruptcy 'shall be deemed' vested with all the rights, remedies, etc. It therefore gives a rule of interpretation rather than a substantive right."

While none of these cases consider, nor have we been able to discover any reported case which considers the effect of the amendment upon the bankrupt's exemptions, it is nevertheless apparent from the opinions of the various courts, the report of the Judiciary Committee, and the construction of the amendment by the leading authors upon this subject, that the amendment is in no manner directed against the bankrupt's claim to exemptions, nor is it possible to see how this could be so, in view of the provisions of section 6 of the bankruptcy act and in this state, in view of the insolvency act.

Upon this topic we feel that there is little to be added to the learned discussion of this question by the referee as contained in his certificate.

Summarizing our argument upon the first subdivision of this brief we find the state statutes of California containing these provisions.

Civil Code, section 1237:

> "The homestead consists of a dwelling house in which the claimant resides and the land upon which the same is situated, selected as in this section provided."

The trustee reads this section as "property which *has been selected* as in this section provided". While we would read the same section to mean that the homestead is the dwelling house and land *to be selected*. And it will be observed that there is no limit as to the time within which this selection shall be made.

Section 1240:

> "The homestead *is* exempt from execution or forced sale except as in this section provided."

This section is the only provision of our law stating that the homestead is exempt from execution or forced sale and of itself prescribes an exemption. Though there are various provisions as to the selection of a homestead by the party himself, his wife, or by the court, our state law contemplates that provision must be made for the selection of a homestead whenever claimed, because the homestead is an exemption prescribed.

Section 1262:

> "In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowl-

> edged, a declaration of homestead, and file the same for record."

Paragraph 64, section 10 of the Insolvent Act of 1895 states that:

> "It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead in the manner provided by section 1465 of the Code of Civil Procedure."

and section 6 of the National Bankruptcy Act of 1898 provides that this act shall not affect the allowance of the bankrupt's exemptions which are prescribed by the state law in force at the filing of the petition, etc.

If the procedure prescribed by section 1262 must be followed in all cases in order to create the homestead, then there can be no such thing in California as a homestead exemption when that procedure has not been followed. Yet C. C. P., section 1465, directs the court to set aside property of a decedent including the homestead selected by him in his lifetime and "if none has been selected, designated, and recorded" the court must set apart, select, and cause to be designated a homestead. Manifestly the creation of the exemption does not depend upon the action of the party himself. The conclusion seems irresistible that a homestead exemption is prescribed by law and is one of the rights guaranteed to a resident of California, and the procedure for selecting and claiming that right is as follows:

1. Where neither death nor insolvency proceedings have ensued by designating and recording his selection or declaration under section 1262 of the Civil Code.

2. Where death has ensued, the selection shall be made by the court by petition therefor under section 1465, C. C. P.

3. Where proceedings in insolvency under the state law have been commenced the selection shall be made by the court upon petition therefor under paragraph 64, section 10 of the Insolvency Act.

4. Where there has been an adjudication under the bankruptcy act the claim for exemption must be made in the schedule by the bankrupt under section 7 of the bankrupt act.

The foregoing is merely the procedure which the party or his heirs must adopt to make known his claim with such certainty that his legal standing may be known and the homestead set apart. The exemption is not made because of any benefit to the state by reason of the procedure to claim a homestead. It is made in order that this man and his family shall not be rendered homeless by the avarice of creditors. Section 6 of the bankruptcy act was designated to protect this right, and the courts have repeatedly and unanimously held that this right should be guarded and conserved with the greatest liberality.

It is submitted that, if there were no national act in existence, this bankrupt and his family would, under the state statute, be protected in the homestead. Yet the national act expressly declares in

section 6 thereof that the act shall not affect the allowance of the exemption to the bankrupt prescribed under the laws of his state, but this is exactly what the trustee is seeking to accomplish through his construction of the bankruptcy law; to wit: a nullification of the exemptions prescribed by the state and in which the bankrupt would be secure under the laws of the state.

We do not deny that, so far as the administrative features are concerned, all state statutes relating to the bankrupt's property, including the state insolvency law are in abeyance. But those portions of our state law which prescribe the exemptions to be allowed to the bankrupt, are expressly continued in force by section 6 of the bankruptcy act.

II.

THE CONVEYANCE BY THE BANKRUPT AND HIS WIFE OF THE REAL PROPERTY IN QUESTION FOR THE BENEFIT OF HIMSELF AND HIS CREDITORS IN AN ATTEMPT AT REHABILITATION OR FOR THE BENEFIT OF ALL HIS CREDITORS DOES NOT PRECLUDE THE MAKING OF A CLAIM FOR A HOMESTEAD EXEMPTION.

The bankrupt and his wife did convey the property prior to the adjudication. As we have pointed out the referee's certificate does not show all of the facts according to the testimony in relation to this transfer, but the referee finds that it was "intended to be for the benefit of all creditors," and

the trustee at page 31 of his opening brief takes the same view, terming it a transfer "for the benefit of the creditors of the bankrupt". All the authority cited by the trustee in his argument, however, concerns cases where a transfer was made as a preference. We desire to direct the attention of the court to this fact, that the trustee was appointed December 13, 1912, and that on the 20th day of December, 1912, just one week later, the transferee, Mr. Wayman, delivered the property so conveyed to him to the trustee. There is therefore no authorization or basis for the inference to be gained from some of counsel's argument to the effect that the property was "recovered". The fact is that this was an attempt in good faith upon the part of the bankrupt to protect his creditors and himself and that as the referee states:

> "My conclusion upon this point is that the conveyance to Willard O. Wayman was in trust for the creditors which trust was never executed, being avoided by the bankruptcy proceeding."

We therefore submit that the authorities and argument made by the trustee upon this question are not in point, and that the deed was of no effect at all. There is no allegation or claim of fraud upon the part of the bankrupt; there is no allegation or claim that the bankrupt intended to prefer any creditor. The attempted conveyance was a nullity. An attempt to transfer under such circumstances

had no effect upon the bankrupt's claim to the homestead.

Bashinsky v. Talbott, 9 A. B. R. 513; 119 Fed. 337;
In re Falconer, 6 A. B. R. 557; 110 Fed. 111;
In re Soper, 173 Fed. 116.

Even were the transfer fraudulent, there is abundant authority on the point to the effect that it would not bar the bankrupt's claim to exemption upon the recovery of the property by the trustee. We beg to again refer to the referee's opinion on this question found in his certificate (Petition for Revision, pages 18 and 19).

In conclusion it is submitted on behalf of the bankrupt and his wife that the order of the District Court affirming the order of the referee allowing the homestead exemption should be affirmed.

Respectfully submitted,

HARTLEY F. PEART,
ERNEST K. LITTLE,
Solicitors for Respondents.

No. 2421

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARTHUR H. BRANDT, as trustee of F. S. MAYHEW, in bankruptcy,

Petitioner,

vs.

F. S. MAYHEW and MRS. F. S. MAYHEW, husband and wife,

Respondents.

In the Matter of F. S. MAYHEW,

In Bankruptcy.

PETITIONER'S CLOSING BRIEF.

Counsel for respondents add to the facts stated in the petitioner's opening brief certain other facts which are not disclosed by the record but which they state were shown by the testimony taken before the referee. Even were it conceded that these facts were true, and this court could consider them on this petition, they have little or no bearing on the case. The trustee has made no

point on the delay of the bankrupt in claiming his exemptions in bankruptcy, provided that he is otherwise entitled to them. The sole question in issue is whether or not respondents are entitled in any event to the exemption claimed, or whether, on the contrary, they are precluded from claiming it by reason of their failure to perfect the homestead prior to adjudication by filing their declaration as provided by the state law or by reason of their voluntary transfer of the property for the benefit of the creditors of the bankrupt.

The propositions contained in respondents' brief have to a large extent been already answered in the petitioner's opening brief. There are some matters, however, which require further notice. These will be noted as briefly as possible, preserving, for the purpose of clarity, the outline presented in respondents' brief.

1A.

The first position of petitioner in his opening brief was that the bankrupt is not entitled to claim a homestead exemption under the general homestead laws of the State of California for the reason that neither he nor any one in his behalf had perfected such a homestead as required by the state law, prior to his adjudication. In support of this proposition the case of In re Youngstrom, 153 Fed. 58; 82 C. C. A. 232, was cited. The attention of the court was called to the fact that there was one or two District Court decisions

to the contrary, notably the cases of In re Culwell, 165 Fed. 828, and In re Fisher, 142 Fed. 205.

In answer to this position of the petitioner, respondents quote at length from the case of In re Culwell, supra, and cite a number of other cases as supporting this holding. An examination of these cases fails to show that they are at all pertinent. In the case of In re Friedrich, 100 Fed. 284, it was held that in case of a copartnership which had filed a petition in voluntary bankruptcy, an actual severance of the stock in trade of that portion which was claimed exempt need not be made at the time of filing the petition in bankruptcy, since the state law provided that such a severance could be made even after levy of execution. In the case of In re Brumbraugh, 128 Fed. 97, it was held that a bankrupt was entitled to claim his exemption in bankruptcy as against a judgment creditor holding a judgment for breach of promise of marriage, notwithstanding the fact that by the state law the exemption could not be claimed on execution on a judgment based on tort, this on the ground that the creditor could reach the property after it had been set aside in bankruptcy. The case of Goodman v. Curtiss, 174 Fed. 646, holds only that a bankrupt does not lose his right to claim an exemption by his failure, through the mistake of his attorney, to claim it at the time of filing his petition,—this by virtue of the right of amendment accorded by General Order XI. The

cases of Steele v. Buel, 104 Fed. 968, and Pulsine v. Hussy, 9 A. B. R. 657, hold only that the provision in subdivision 5 of Section 70 of the Bankruptcy Act excluding from property that passes to the trustee, life insurance policies possessing a cash surrender value, etc., applies only in those jurisdictions in which a policy is not exempt by the state law; that it restricts but does not enlarge the title of the trustee and does not limit the provisions of Section 6. It is difficult to see how any of these cases have any bearing whatever upon the question in issue; viz., whether a bankrupt is entitled to claim a homestead that has not been created as required by the laws of the state.

The case of In re Burnham, 202 Fed. 762, though that case involved a question of homestead, is not a decision that supports the respondents' position since in that case the court held that, even on the assumption that the bankrupt would be entitled under the decisions of In re Culwell and In re Fisher, to perfect his claim in bankruptcy after adjudication, he had in any event delayed too long and was therefore precluded. An analysis of the authorities therefore, shows the situation substantially as stated in petitioner's opening brief. In support of the petitioner's position is the case of In re Youngstrom, a decision of the United States Circuit Court of Appeals for the Eighth Circuit; to the contrary are the District Court decisions of In re Culwell and In re Fisher.

The reasoning of the court in the case of In re Culwell, as appears from the extract cited in respondents' brief, does not commend itself as either logical or permissible under the provisions of the Bankruptcy Act. It may be entirely true that the Act does not make it a precedent to having a homestead allowed to the bankrupt that the homestead shall have been designated pursuant to the state statute prior to adjudication in bankruptcy, and that "courts of bankruptcy are not controlled as to the time or manner in which claims for exemption may be preferred in bankruptcy". The court, however, entirely overlooks the fact that under statutes similar to the general homestead laws of California, there is no homestead, and consequently no exemption, until the statutory requirements have been complied with. To permit the bankrupt, after adjudication, to take the statutory steps, is to permit him *to create* an exemption that did not exist at the date of his adjudication. Such a position, as pointed out in the Youngstrom case, is impossible under the provisions of the Bankruptcy Act. The holding of the latter case, and the reasoning of the court therein is, it is submitted, unanswerable on any proper construction of the provisions and application of the Bankruptcy Act.

1B.

The second position taken by the petitioner in his opening brief was that the bankrupt can not predi-

cate his right to an exemption on the provisions of the Insolvent Act of the State of California for the reasons (1) that the right given to the bankrupt thereby is not an "exemption" as that term is used in Section 6 of the Bankruptcy Act; and (2) that even if it is, it is not one "prescribed by a state law in force".

Respondents direct the attention of the court to the case of In re Schwartz and In re McCoy, Nos. 5906 and 5536, respectively, in the District Court for the Northern District of California, and to an extract from the opinion of the referee in the latter case. In neither of these cases did the District Court file an opinion and it does not appear upon what grounds the respective orders of the referees in those cases were affirmed. If the cases are cited as authority or precedent it will suffice to say that the purpose of this petition is to review the ruling in those cases as well as that in the case at bar, and to secure a final and authoritative determination of the questions there involved.

In answer to petitioner's argument that the word "exemption" as used in Section 6 of the Bankruptcy Act applies only to "exemptions from execution" and has no reference to a right that is only given by the state Insolvent Act, to be availed of in insolvency proceedings, respondents content themselves with merely citing Section 1240 of the Code of Civil Procedure to the effect that "the homestead is exempt from execution or forced sale, save

as in this section provided''. They seek to deduce from this section, presumably by the use of the word ''exempt'' that a homestead of *any* character is necessarily ''an exemption''. It will suffice to say in answer to any such argument that the homestead mentioned in Section 1240, as heretofore stated, does not arise or come into existence until the filing of the statutory declaration as provided in Sections 1262 and 1263. Section 1265 provides that *''from and after the time the declaration is filed for record* the premises thereon described constitute a homestead''. It is true that this homestead is ''exempt'' but *there is no homestead* until it has been perfected as provided by these sections. Obviously the term ''exempt'' as here used refers solely to the statutory homestead provided for in that and the succeeding sections of the Civil Code. There is no provision in any statute of the state so far as we can ascertain that employs that term in connection with a purely ''probate'' or ''insolvent'' homestead. If the latter is an ''exemption'', therefore, it must be so for some reason other than the use of that term in Section 1240.

Petitioner further argued in his opening brief that whether the right accorded by paragraph 64 of the Insolvent Act was an exemption or not, it was in any event not one that was ''prescribed by the state law in force'' since the Insolvent Act was suspended by the national Bankruptcy Act. In answer to this respondents rely simply upon the case of In re Amoratis, 178 Fed. 919, in which

this court held that a creditor was entitled to claim a priority in bankruptcy that was provided for in the Insolvent Act of the state. Just how this decision bears upon the question as to the suspension of the Insolvent Act by the Bankruptcy Act, does not appear. As far as the opinion discloses, no such question was presented in the case, and it is not discussed by the court. The right of priority allowed to the creditor by the Insolvent Act was allowed in bankruptcy by reason of the express provisions of subdivision 5 of Section 64 of the Bankruptcy Act. That provision provides that priority is to be given to such creditors "who by the laws of the states or the United States are entitled to priority". The "laws of the state" referred to are not limited to "laws in force" as provided by Section 6. Accordingly, there is no inconsistency between the holding of the court in this case and the general proposition that the Insolvent Act is in complete abeyance.

The question as to the extent of the suspension of the Insolvent Act is not entirely free from difficulty as even a casual reading of the cases and text writers will show. The more recent decisions, however, and the present weight of authority as stated in the opening brief is that the state laws are in complete abeyance. This is the position of Samuel Williston, an authority on the law of bankruptcy, in an article in the Harvard Law Review ("The Effect of a National Bankruptcy Law Upon

State Laws", 22 H. L. R. 547), a position which on logic and principle seems to be unassailable.

But however this fact may be, there can be no question that the Insolvent Act is at least suspended in all particulars in which it is inconsistent or in conflict with the national act. This fact is not questioned by respondents in their brief. It was pointed out in the opening brief that the provision of the Insolvent Act in question was in such conflict for the reasons (1) that there is no provision in the Bankruptcy Act for the jurisdictional procedure of the state act; (2) that the discretion given the judge in the Insolvent Act is not available to the judge in bankruptcy; and (3) that the provisions of the Insolvent Act are at variance with the scheme of title of the national act.

The only answer made to this latter position by respondents is the citation of the case of In re Dicks, 198 Fed. 293. This case holds that a widow of a bankrupt is entitled to an allowance provided by the state laws on the death of the bankrupt, pending bankruptcy proceedings. Just what bearing this decision has is not apparent, since a widow's right, on the death of the bankrupt, is not here involved. The right here accorded by the District Court of Georgia is expressly reserved to the widow and children of a deceased bankrupt by Section 8 of the Bankruptcy Act. Further, the case itself, even if pertinent on any theory, is totally at variance with the case of In re McKenzie,

142 Fed. 383, a Circuit Court of Appeals decision, and is at present pending in the Supreme Court of the United States on certification by the Circuit Court of Appeals. If it be cited merely for the dictum that the title of the trustee is not an absolute title but one simply for the distribution to creditors, it is difficult to see what pertinency even that fact has. Whether the title of the trustee be for distributive purposes or an absolute title, is immaterial, since in any event, by the very provisions of Section 70, it is vested in the trustee as of the date of adjudication. It cannot be held in abeyance until long after that date,—a result that follows from the application of the provisions of the Insolvent Act. If this case illumines the "twilight zone" referred to by petitioner in his opening brief, therefore, it does so but very dimly.

The respondents do not in any way distinguish the case of In re Anderson cited by petitioner in his opening brief. They simply say the two procedures involved in the state law and the Bankruptcy Act in that case were beyond question "in conflict" and that this was unquestionably the basis of the decision. On the contrary, the court did not confine its decision to any such ground. Judge Lowell expressly holds that the rights accorded by the provisions of the state Insolvent Act were suspended by the passage of the Bankruptcy Act, and further, that there was no place in the Bankruptcy Act for the exercise of the

discretion of a judge of probate as contemplated in the Insolvent Act, one of the positions taken by the petitioner herein. This opinion of Judge Lowell, both by reason of the ability of the learned judge and by reason of his evident reluctance in reaching his conclusion, is entitled to careful consideration.

Before closing this branch of the case, we desire to call the court's attention to an inadvertence in the opening brief. In arguing the proposition that the jurisdictional procedure requisite for the setting aside of the homestead under the Insolvent Act of the state is not available in bankruptcy reference was made to the requirements of Section 1465A of the Code of Civil Procedure, providing for notice, etc. This was not necessary since paragraph 64 of the Insolvent Act itself provided for such notices, a fact which was inadvertently overlooked by the petitioner in preparing his brief. The concluding clause of paragraph 64 of the Insolvent Act is as follows:

> "But no property or homestead shall be set apart, as aforesaid, until it is first proved that notice of the application therefor has been duly given by the clerk, by causing to be posted in at least three public places in the county at least ten days prior to the time of such hearing, setting forth the name of said insolvent debtor, and the time and place appointed for the hearing of such application, which said notice shall briefly indicate the homestead sought to be exempted or the property sought to be set aside; and the decree must show that such proof was

made to the satisfaction of the court, and shall be conclusive evidence of that fact".

1C.

In answer to the contention of the petitioner that even if the bankrupt were otherwise entitled to claim his homestead exemption under the Insolvent Act, he is precluded from doing so by the express provisions of Section 47A (2) of the Bankruptcy Act as amended in 1910, respondents content themselves with a statement of the immediate purpose of the passage of the amendment. As stated in the opening brief there is no question that the immediate occasion of the passage of the amendment of 1910 to Section 47A (2) was the decision in the York Manufacturing Company case. As pointed out, however, the terms of the amendment are clear and unambiguous, and consequently must be given effect in all situations in which, by its terms, it is applicable. It will serve no useful purpose to discuss this matter again at length, since it is fully considered in the opening brief.

In the summary of their argument, on the first main point, respondents state that the trustee reads Section 1237 as "property which has been selected". How any other reading can be given to the section it is impossible for the petitioner to conceive. Most certainly there is no homestead under the provisions of that title of the Civil Code until a declaration has been recorded as provided therein. As a matter of fact, as heretofore pointed out, Section 1266

expressly provides that the homestead only exists *"from and after the time the declaration is filed for record"*. A homestead when selected is of course an exemption made so by the direct provisions of the statute, but how it can be, in any definition of the term, such an exemption until it actually comes into existence, does not appear. Respondents throughout their brief confuse the "homestead" as used in Title 5, Part 4 of the Civil Code and the "probate" or "insolvent" homestead referred to in the Insolvent Act and Section 1465 of the Code of Civil Procedure, and discuss them on the assumption that they are one and the same thing. Such a position, of course, is untenable and leads only to confusion in discussion.

II.

In answer to the second main point of petitioner that in any event the bankrupt and his wife have precluded themselves from claiming a homestead exemption in bankruptcy by their voluntary conveyance of the real property for the benefit of creditors, respondents simply rely on the cases cited by petitioner in his opening brief.

The statement that all of the cases cited concern preferential transfers is not strictly true. The cases of In re Staunton, 117 Fed. 507, and Bashinka v. Talbott, 119 Fed. 337, are both cases of assign-

ments for the benefit of creditors. In the case of In re Staunton, the District Court of the Eastern District of Pennsylvania held that where a bankrupt had voluntarily delivered personal property to an assignee for the benefit of his creditors out of which he could have claimed his exemptions, he thereby precluded himself from subsequently claiming an exemption in the proceeds of the sale of such property. The court, in this connection, said:

> "I repeat he must be the owner of the articles, either cash or chattels, which are to be set apart for his use, for his ownership merely continues and is not created by his claim and the proceedings thereunder. The application of this rule forbids the allowance of the item that is now contested. He did not own the cash in question when the petition in bankruptcy was filed, and he never had owned it. It belonged to his creditors, the legal title being in the assignee or trustee, and for this reason it was beyond his reach."

In the case of Bashinka v. Talbott, supra, the bankrupt had, prior to his adjudication, assigned a judgment to a trustee for the benefit of his creditors. The judgment was collected after adjudication in bankruptcy, and the bankrupt claimed an exemption in the proceeds. By a divided court, it was held that he was not precluded from claiming his exemption on the ground that there had been no fraud. Judge Pardee, however, in dissenting, said:

> "Talbott was put into bankruptcy because of the assignment of the Lan-

> caster judgment. Up to the adjudication in bankruptcy there seems no pretense that under the law of Georgia he could have assigned a homestead out of the proceeds of the judgment. In effect, the bankrupt's creditors sued for and recovered the proceeds of the judgment (for it was done by their trustee), and thereupon Talbott applies for and is allowed a homestead out of those proceeds. It would be interesting to know under what law Talbott gets his homestead. It is not supposed that the bankruptcy law allows any homestead to bankrupts except as otherwise entitled. The law of Georgia does not allow a debtor a homestead out of the property that he has voluntarily sold and conveyed. I think the learned judge of the court below and my brethren here have been too liberal with the property that should under the bankrupt law go to Talbott's creditors."

As pointed out in the opening brief the error of the majority opinions in In re Falconer, and in Bashinka v. Talbott and of the opinions in the other cases cited by respondents, comes from a failure to distinguish between fraudulent transfers and transfers which in their nature are merely voidable, such as preferential transfers and transfers for the benefit of creditors. As pointed out, *by the very terms of Sections 67 and 70 of the Bankruptcy Act,* a fraudulent transfer is null and void and does not preclude the claim of exemption. The character of the fraudulent transfer referred to in these sections has been discussed by the Supreme Court in the case of Corder v. Arts, 213 U. S. 223; 53 L. Ed. 772. In that case Justice Day in holding that a preferential transfer could not be held

to be included within the fraudulent transfers provided for in Section 67, said:

> "We are of the opinion that Congress in enacting 67e and using the terms 'to hinder, delay or defraud creditors' intended to adopt them in their well known meaning as being aimed at conveyances intended to defraud. In Section 60 merely preferential transfers are defined and the terms on which they may be set aside are provided; in 67e transfers fraudulent under the well recognized principles of the common law and the Statute of Elizabeth are invalidated. The same terms are used in Section 3, Subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are *actually fraudulent.*"

A preferential transfer as pointed out by the court in that case, and as is expressly provided in Section 60, subdivision b, is merely voidable. The same, of course, is necessarily true of a transfer for the benefit of creditors, since it is for all purposes legal and valid unless banruptcy intervenes. (Remington on Bankruptcy, Sec. 1606, page 977, and cases cited; Loveland on Bankruptcy, 4th Ed., page 329, and cases cited.) The conclusion, therefore, is unavoidable, that in the cases of preferential transfers and transfers for the benefit of creditors the title passes, and consequently at the date of adjudication there can be nothing out of which the bankrupt can claim his exemption. No other conclusion is logically possible.

Apart from the foregoing considerations, no good reason appears why the bankruptcy court should intervene to help the bankrupt and his wife claim an exemption out of property which they have voluntarily and without any reservation, transferred for the benefit of all their creditors. Their action in voluntarily submitting all their property for the satisfaction of their valid debts was morally and legally commendable. While the federal courts may be liberal in permitting the bankrupt his exemptions, this liberality should certainly not go to the extent of countenancing the reviving of a claim voluntarily waived.

Respectfully submitted,

R. H. Cross,

Attorney for Petitioner.